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No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendants.

(Alabama and Mississippi Boundary Cases)

REPORT OF WALTER P. ARMSTRONG, JR. SPECIAL MASTER

Apr. 9, 1984

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REPORT OF SPECIAL MASTER

In its opinion in *U. S. v. Louisiana*, 363 U.S. 1, 4 L.Ed.2d 1025, 80 S.Ct. 961 (1960), the Court made it clear (Note 108) that it did not intend to settle by that opinion the location of the coastline of any state, which included Mississippi (Note 135) and Alabama (Note 139). The decree entered pursuant to that opinion 364 U.S. 502, 5 L.Ed.2d 247, 81 S.Ct. 258 (1960) likewise left this question open, saying only that:

> As used in this decree, the term 'coastline' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. (364 U.S. 503).

The decree contemplated possible agreement between the parties as to where the coastlines of Alabama and Mis-

sissippi actually lay; but no such agreement has been reached. On November 1, 1979 the State of Mississippi filed a Motion for Entry of a Supplemental Decree to settle the matter, and on February 22, 1980 the State of Alabama filed a similar motion. Subsequently, on January 17 and March 6, 1980 the United States filed cross-motions as to each state for the entry of a supplemental decree. By Order entered February 19, 1980 (444 U.S. 1064, 62 L.Ed.2d 746, 100 S.Ct. 1005) the motion of the State of Mississippi and the cross-motion of the United States in regard thereto were referred to the Special Master previously appointed by the Court in this case (395 U.S. 901, 23 L.Ed.2d 215, 89 S.Ct. 1737); and on March 17, 1980 similar action was taken as to the motion of the State of Alabama and the cross-motion of the United States as to that state (445 U.S. 923, 63 L.Ed.2d 755, 100 S.Ct. 1306).

The sole issue raised by these motions is whether the coastlines of the States of Mississippi and Alabama are the line of ordinary low water along the southern mainland and around certain islands adjacent thereto (known as the "barrier islands"), or whether the waters of Mississippi Sound which lie north of these islands are inland waters and those coastlines are therefore the line of ordinary low water along the southern shore of those islands together with the line marking the seaward limit of those waters. If those waters are inland waters, as the states contend, then they and everything that lies beneath them belong to the states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).[1] If, on the other hand, the waters of Mississippi Sound are marginal and open sea, then the only claim to them and whatever underlies them which

1. In my opinion, the holding of the court in *U. S. v. California*, 332 U.S. 19, 91 L.Ed. 1889, 67 S.Ct. 1658 (1947) does not alter this rule, which was recognized and confirmed by Sec. 3 of the Submerged Lands Act (43 U.S.C. 1311) subsequent to that opinion.

the states have is pursuant to the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, Sec. 4 of which (43 U.S.C. 1312), fixes the seaward boundaries of a coastal state as "a line three geographical miles distant from its coastline,"[2] and Sec. 3 of which (43 U.S.C. 1311) releases to the states "all right, title and interest of the United States, if any it has," in "the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters". As some of the barrier islands lie more than six miles from the mainland shore, this would create a number of enclaves of open sea within Mississippi Sound belonging to the United States (see attached chart Exhibit A).

THE GENEVA CONVENTION

The Court has adopted the provisions of the Convention on the Territorial Sea and the Contiguous Zone (the Geneva Convention) as the proper basis upon which to determine the seaward boundaries of the various states. *U. S. v. California*, 381 U.S. 139, 165, 14 L.Ed.2d 296, 313, 85 S.Ct. 1401 (1965). The states have introduced a great deal of evidence as to how the waters of Mississippi Sound differ from those of the Gulf of Mexico lying south of the barrier islands and of their similarity to other waters admittedly inland, and as to the similarity of the northern coast of the barrier islands to the mainland shore and the differences between that coast and the southern coast of the

2. Subsequent to the original reference to the Special Master, the State of Mississippi filed with the Court a "Motion for Relief from Final Decree," which was also referred to the Special Master. 73 L.Ed.2d 1337. As all of the points raised by this motion were considered by the Court prior to entry of the decree, and as the United States concedes that the decree does not foreclose the claim that Mississippi Sound is inland waters (Memorandum of the United States in Opposition, p. 2), I recommend that this Motion be overruled.

islands; but under that holding, all of this appears completely immaterial. It is the Geneva Convention which must govern.

Article 3 of the Convention provides:

> Except where otherwise provided in these Articles, the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal state.

Article 10 provides in part:

> 2. The territorial sea of an island is measured in accordance with the provisions of these Articles.

Applying these two Articles strictly, and construing them under Section 4 of the Submerged Lands Act (43 U.S.C. 1312), produces the effect for which the United States contends and creates the enclaves of high seas within Mississippi Sound as shown on the attached chart. The states contend that these enclaves, being completely surrounded by their territorial seas and therefore inaccessible to international usage, serve no purpose and should therefore be assimilated to those territorial seas. The United States, on the other hand, while conceding the lack of access, argues that in order to maintain its international position, it is necessary for it to insist upon these enclaves. Neither of these arguments appears to be pertinent. The question is governed solely by the provisions of the Covenant itself, which appear clear. It is significant to note that both the 1930 Hague Conference and the International Law Commission considered and rejected proposals for the assimilation of such enclaves.

If this were all there is to it, this would be a simple case indeed. But it is not. Article 3 recognizes certain

exceptions to the general rule, and the states insist that Mississippi Sound comes within one or more of these exceptions. Therefore, it is necessary to consider each of them separately.

STRAIGHT BASELINES

Article 4 of the Geneva Convention reads in part as follows:

> In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

The states insist that by its action (although not explicitly) the United States has in fact adopted such a system of straight baselines, which would include Mississippi Sound as internal waters.

I had occasion to deal with a similar coastline, that of the State of Louisiana, in an earlier report (July 31, 1974 at pp. 5-13) which was approved by the Court (420 U.S. 529, 43 L.Ed.2d 373, 95 S.Ct. 1180). I see no basis upon which to differentiate the situation of Mississippi and Alabama in regard to the matters there dealt with, and none for changing my views as there expressed.

The states, however, contend that the United States has traditionally claimed as inland waters sounds and straits lying behind islands where none of the entrances between islands or islands and the mainland exceeds ten miles in width, and that this amounts to the adoption of straight baselines. It is apparently true that prior to the ratification by the United States of the Geneva Convention

(March 24, 1961) it adhered to the so-called "ten mile rule"; but since that time, as the Court held in *United States v. California, supra*:

> Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States. (381 U.S. at p. 164).

And the following language from the Court's opinion in that case appears to me to foreclose that argument completely:

> We agree with the United States that the Convention recognizes the validity of straight baselines used by other countries, Norway for instance, and would permit the United States to use such base lines if it chose, but that California may not use such baselines to extend our international boundaries beyond their traditional international limits *against the expressed opposition of the United States*. The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. *We conclude that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States.* (381 U.S. 167-168. Emphasis supplied). (See also 394 U.S. 11, 74, Note 97).

I therefore conclude that the United States has not in fact adopted the straight baseline method authorized by Article 4 of the Convention and, as the Court says in *United States v. Louisiana*, 394 U.S. 11, 22 L.Ed.2d 44, 89 S.Ct. 773 (1969):

> While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furtherest extent consonant with international law. (394 U.S. at pp. 72-73).

I am therefore convinced that the adoption of the 24-mile closing line together with the semi-circle test in place of the ten mile rule represents the present position of the United States and that this has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi for reasons that will hereafter appear, and that therefore Article 4 of the Convention does not apply.

JURIDICAL BAYS

In *United States v. Louisiana, supra*, the Court says:

> We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term

> which is used in contrast with "islands" throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines. (394 U.S. at pp. 67-68. Emphasis supplied).

From this it is apperent to me that while under the quoted language Article 4 is the exclusive means of dealing with islands which cannot realistically be considered part of the mainland, and that I am therefore foreclosed from finding that a bay formed in part by such islands is a juridical bay under Article 7, where a bay is formed in part by an island or islands which can realistically be considered part of the mainland it is governed by Article 7 of the Convention, including Section 3 thereof dealing with islands lying in the mouth of a bay. It is to consideration of that Article that I now turn.

The State of Mississippi has apparently abandoned its contention that the barrier islands lying off of its mainland shore are in fact extensions of that mainland and therefore properly assimilable thereto (See United States' Final Post-Argument Memorandum, p. 4), a contention which in my opinion is in any event untenable; however both it and the State of Alabama continue to insist that Dauphin Island, the only such island which lies off of the Alabama mainland shore, is such an extension and so assimilable.[3] In view of this, much of the evidence introduced as to the nature of the north shore of those islands and of the intervening waters between them and the mainland be-

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3. Alabama also argues that if this is true and Mississippi sound as a whole is not a true bay, then a smaller juridical bay exists with a closing line from the western extremity of Dauphin Island to Point Aux Chenes. While this would appear to be true (see Stipulations 4 and 5) it is unnecessary for me to pass upon this point in view of my subsequent findings.

comes irrelevant. The sole questions are whether Mississippi Sound is a juridical bay under Article 7 of the Convention; or, if it is not, whether it qualifies as a so called "historic bay" under Article 7 (6) thereof. Putting aside the latter question for later consideration, I now turn to the requirements of Article 7 for a juridical bay.

The pertinent parts of that article read as follows:

> 2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.
>
> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

Thus, it appears that there are four requirements for a juridical bay: 1) It must be a well marked indenta-

tion; 2) its penetration must be in such proportion to the width of its mouth as to contain land locked waters and constitute more than a mere curvature of the coast; 3) it must have a closing line of twenty-four miles or less;[4] and 4) it must meet the semi-circle test. Each of these requirements will now be considered.

1.) Twenty-Four Mile Closing Line and Semi-Circle Test

In order to determine if Mississippi Sound meets the 24-mile closing line test, it is necessary first to locate its natural entrance points. For this purpose, I turn first to its western extremity.

On May 18, 1982 the United States filed its response to the State of Mississippi's First Request for Admissions. Request No. 19 and the response thereto read as follows:

"REQUEST NO. 19:

Please admit that the Isle of Pitre is a proper extension of the Louisiana mainland.

RESPONSE:

It is admitted that the Isle au Pitre might be treated as an extension of the Louisiana mainland pursuant to the 1969 *Louisiana* decision. It is denied that this treatment is relevant to the case at bar."

The reference in the first sentence of the response is apparently to the following language in *United States v. Louisiana*, *supra*, where the court says:

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4. I do not find the provision of sub-section 3 for a fall back line applicable to this case, as in the absence of islands it would be clearly impossible to draw a straight baseline of twenty-four miles which would meet the other requirements of Article 7.

While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance—in the light of these and any other relevant criteria and any evidence he finds it helpful to consider—whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the Convention on the Territorial Sea and the Contiguous Zone. (394 U.S. at p. 66).

Assuming the prerogative given in the above language and applying it to what appear to be the undisputed facts in the present case, I therefore hold that Isle au Pitre may be properly assimilated to and considered as an extension of the Louisiana mainland for all purposes here pertinent, and that therefore the western terminus of the closing line of Mississippi Sound is the easternmost promontory of that island.

The next question is how that line should be drawn eastward from that point, in view of the fact that Mississippi Sound, because of the presence of the barrier islands, has more than one mouth. The Court has apparently settled this issue in *United States v. Louisiana*, *supra*, where referring to the second sentence of Article 7, Section 3 of the Covenant (quoted above) it says:

> While the only stated relevance of such islands is to the semi-circle test, it is clear that the lines across the

various mouths are to be the baselines for all purposes. The application of this provision to the string of islands across the openings to the Lake Pelto-Terrebonne Bay-Timbalier Bay complex has raised the following questions: (a) between what points on the islands are the closing lines to be drawn, and (b) should the lines be drawn landward of a direct line between the entrance points on the mainland?

(a) It is Louisiana's primary contention that when islands appear in the mouth of a bay, the lines closing the bay and separating inland from territorial waters should be drawn between the mainland headlands and the seawardmost points on the islands. This position, however, is refuted by the language of Article 7(3), which provides for the drawing of baselines "across the different mouths" (emphasis supplied), not across the most seaward tips of the islands. There is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland—that is, by "a line joining the low-water marks of [the bay's] natural entrance points." (394 U.S. at pp. 55-56).

Here again the facts appear to be undisputed. It is stipulated that the total water distances of the entrances to Mississippi Sound between the eastern extremity of Isle au Pitre and the western extremity of Dauphin Island total 21.7641 miles (Stipulation No. 1), or less than 24 miles. There is therefore no question but that if Dauphin Island can realistically be considered a part of the mainland the 24-mile test is met. That therefore is the next matter which I will consider.

How does Dauphin Island differ from the other barrier islands which are apparently conceded not to be extensions of the mainland? In four respects only: 1) proximity to the mainland, 2) degree of habitation, 3) connection to the mainland by a bridge, and 4) location in the mouth of Mobile Bay. It therefore remains to examine which if any of these are relevant.

It is stipulated that the total water gap distance between the northern tip of Dauphin Island and Cedar Point on the mainland is no more than 1.60 nautical miles (Stipulation No. 7). While this is substantially less than the distance of any of the other barrier islands from the mainland, still it is considerably more than that of Isle au Pitre therefrom, and, I believe, more than was contemplated by the Court in the language quoted from *United States v. Louisiana, supra*. In the other respects referred to in that language, Dauphin Island differs little if any from the other barrier islands.

The degree of development of the island for human habitation and use seems to have no bearing upon the issue whatever. Many highly developed islands remain true islands and do not by being so developed become extensions of the mainland.

The States insist however that because Dauphin Island is connected to the mainland by a bridge its development is significant. The United States, on the other hand, takes the position that any such contention is precluded by the *Florida* case, 420 U.S. 531, 43 L.Ed.2d 375, 95 S.Ct. 1162 (1975); 425 U.S. 791, 48 L.Ed.2d 388, 96 S.Ct. 1840 (1976) denying the keys the status of mainland extension despite a bridge connection to the mainland and by *United States v. California*, 447 U.S. 1, 64 L.Ed.2d 681, 100 S.Ct. 1994 (1980). The latter view seems to me to be sound, and I therefore find that the mere fact that it is connected to the mainland by a bridge or other artificial structure does not standing alone make Dauphin Island a part of the mainland. However, this fact taken with others may be in-

dicative . See *United States v. Louisiana, supra* (394 U.S. at p. 72, Note 95, final sentence).[5]

The fourth and final distinction between Dauphin Island and the other barrier islands appears to be unique and significant. Dauphin Island is directly in the mouth of Mobile Bay, which is admittedly a juridical bay. Its closing line as established by the Baseline Committee extends westward from the western extremity of Mobile Point to the eastern extremity of Dauphin Island, thence along the eastern tip of Dauphin Island to Little Dauphin Island, thence along the northeast coast of Little Dauphin Island to North Point, thence to Cedar Point. (See Nautical Chart 11376,-Joint Exhibit 1). It appears to be agreed that all waters north of this line are inland waters. Thus Dauphin Island at least touches upon (and, if Little Dauphin Island is considered a part of it, is substantially coextensive with) inland waters of the state of Alabama. (See Figures 5 and 6, Post Trial Brief of the State of Alabama).

There seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland. If this is correct, then Dauphin Island, as it adjoins the mainland, is clearly an extension thereof; in effect, a peninsula extending westwardly therefrom and separating the Gulf of Mexico from Mississippi Sound. It meets the criteria recognized by the Court in *United States v. Louisiana, supra*:

> "Obviously, some islands must be treated as if they were part of the mainland. The size of the island,

5. The United States argues that because the bridge connecting Dauphin Island to the mainland was partially destroyed by hurricane Frederick, it is not a permanent structure, although it has since been replaced. I find this argument without merit. It was clearly intended as a permanent structure.

> however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland." Boggs, Delimitation of Seaward Areas under National Jurisdiction, 45 Am J Int'l 240, 258 (1951).
>
> "Islands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." Pearcy, Geographical Aspects of the Law of the Sea, 49 Annals of Assn. of American Geographers No. 1, p. 1, at 9 (1959).
>
> The director of the Coast of Geodetic Survey, Department of Commerce, has stated the following rule for the assimilation of islands to the mainland:
>
> "The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, *or they form an integral part of a land form.*" Memorandum of April 18, 1961, excerpted in 1 Shalowitz, supra, n. 7, at 161, n. 125. (Emphasis supplied).
>
> Shalowitz has recognized that "[w]ith regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." Id., at 162. And see Strohl, supra, n 23, at 76, fig 18. (394 U.S. at p. 66, Note 85).

If my reasoning above is correct, and inland waters are to be considered part of the mainland, then Dauphin Island is "near, separated from the mainland by so little water

that for all practical purposes the coast of the island is identified as that of the mainland" and is "so situated that the waters between them (it) and the mainland are sufficiently enclosed to constitute inland waters." In fact, it would appear as a general rule derived from Article 7 Section 3 of the Geneva Convention and the Court's interpretation thereof in *United States v. Louisiana, supra*, (394 U.S. at p. 55) that where islands lie within the mouth of a bay they are to be considered as part of the mainland for all purposes.

It now remains to apply the tests outlined by the Court in *United States v. Louisiana, supra*, (394 U.S. at p. 66) to Dauphin Island in light of the above.

1.) *Size*: Dauphin Island is approximately 14.75 miles long and 1.58 miles wide at its widest point. It tapers to 1500 feet wide at its eastern end and to a mere 400 feet at its western end. However as noted above, size cannot itself serve as a criteria, as it must be considered in relationship to its shape, orientation and distance from the mainland.

2.) *Distance from the Mainland*: Dauphin Island in 1.60 nautical miles from Cedar Point (Stipulation No. 7); but it is immediately adjacent to the inland waters of Mobile Bay, which are a part of the mainland.

3.) *Depth and Utility of Intervening Waters*: There are no intervening waters between Dauphin Island and the inland waters of Mobile Bay. The depth of the waters between Dauphin Island and Cedar Point, exclusive of dredged channels, is no greater than six feet, and therefore cannot as a practical matter be utilized by international traffic.

4.) *Shape*: Dauphin Island is long and narrow, extending from east to west. It appears from its shape and

orientation to be an elongation of Mobile Point; and, in fact, the two appear to have been connected in the Holocene era.

5.) *Relationship to Configuration or Curvature of the Coast*: Generally the configuration of Dauphin Island follows the curvature of the shoreline, with the exception of the projection of Cedar Point.

As indicated above, the geological history of Dauphin Island shows that it was in fact once part of the mainland. In the Pleistocene era some 120,000 years ago barrier ridges formed along the Mississippi coast. Later, in the Holocene era around 18,000 years ago, the sea level was very low. It was so low that Fort Morgan Peninsula was connected to Dauphin Island (or put another way, the mouth of Mobile Bay was above water). The sea level rose sporadically until, about 9,000 years ago, it was only 8 meters below the present sea level. Over the next 5,000 years the Mississippi Sound basin was gradually submerged. By about 4,000 years ago only eastern Dauphin Island was left above water. Due to the interaction of tidal forces and the littoral drift, this eastern part of Dauphin served as a core area from which a sand spit started to grow in a westerly direction. The rest of the islands formed subsequently by a process of aggradation, as the westernly littoral drift carried sediment from the Florida Panhandle, the Alabama mainland, and to a lesser extent, the open sea. As the Court noted in *Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913 (1906):

> Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be "natural appendages of the coast on which they border, and from which, indeed, they are formed." The Anna (1805) 5 C. Rob. 373. (202 U.S. at pp. 52-53).

I am therefore constrained to find that Dauphin Island constitutes an extension of the mainland. In doing so, I am fully aware of the Court's language in *United States v. Louisiana*, *supra*, which I previously interpreted as precluding such a holding in the case of the islands in the Caillou Bay area. However I believe that the factual situation here differs materially, basically because Dauphin Island lies in the mouth of Mobile Bay which is indisputably inland waters.[6]

If I am correct in this finding, and in that regarding Isle au Pitre, then admittedly Mississippi Sound meets the 24 mile test (Stipulation No. 1)[7] and also the semi-circle test (Stipulation No. 9).

2.) Well Marked Indentation Containing Land Locked Waters

Apparently a "well marked indentation" is one which has clearly distinguishable "natural entrance points",

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6. Here it should perhaps be noted that the Special Master in *United States v. Maine* rejected the government's contention that "only small marshy deltaic islands can be considered part of the mainland and coastal islands cannot be assimilated as part of the mainland and cannot be used to join juridical bays" and therefore found that Long Island is an extension of the mainland, relying in part upon my earlier report in this case (See *U.S. v. Maine*, (No. 35) Original) Report of the Special Master, p. 32, Note 22 Filed January 13, 1984).

7. The states contend that even if Dauphin Island is not considered a part of the mainland, then the eastern natural entrance point of Mississippi Sound is Cedar Point, and therefore the total closing line distance is still less than 24 nautical miles (Stipulations Nos. 1 and 7). The United States contends that the eastern natural entrance point to Mississippi Sound is Mobile Point, and that therefore the length of that closing line exceeds 24 nautical miles (Stipulations Nos. 1 and 7). In view of my finding as to Dauphin Island, it is unnecessary for me to pass upon these contentions. Suffice to say that in my judgment, Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and Cedar Point. See *United States v. Louisiana*, *supra*, 394 U.S. at p. 62, Note 83.

within which the waters lie *inter fauces terrei*. But as the Court clearly said in *United States v. Louisiana*, 394 U.S. 11, 22 L.Ed.2d 44, 89 S.Ct. 773 (1969):

> "No language in Article 7 or elsewhere positively excludes all islands from the meaning of 'natural entrance points' to a bay" (394 U.S. at p. 61).

Neither the Geneva Convention nor the Court's decisions afford much assistance in determining what are clearly distinguishable "natural entrance points." The matter seems to be largely subjective and to rest with the adjudicating authority. The parties however have stipulated that the scale map which was introduced as Joint Exhibit 45-3 "is a true and accurate representation of the present geographic features and relationship depicted thereon" (Stipulation No. 3). Based upon this, I find that if Isle au Pitre and Dauphin Islands are accepted as its headlands, Mississippi Sound is a well marked indentation in the coast.

It then remains to determine if its "penetration is in such proportion to the width of its mouth as to contain land locked waters and constitute more than a mere curvature of the coast." The states contend that when a body of water meets the semicircle test (as Mississippi Sound admittedly does; see Stipulation No. 9) then this requirement is fulfilled. I disagree. The Court appears to have settled this point in *United States v. Louisiana*, *supra*, where it says:

> We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7(2), which plainly treats the semicircle test as a minimum requirement. And we have found nothing in the history of the Convention which would support so awkward a construction. (394 U.S. at p. 54).

The problem is even more complex where there are islands in the mouth of the putative bay. Again there appears to be little applicable authority. Of some assistance, however, is the following quotation from the Commentary of the International Law Commission (2 Y.B. Int.L. Comm'n p. 296 (1956)) approved by the Court in *United States v. Louisiana*, *supra*:

> Here, the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. (394 U.S. at p. 56).

Therefore I must once more rely upon largely subjective criteria. Mississippi Sound has multiple mouths, the total water distances of which based upon the findings which I have heretofore made total slightly less than 24 nautical miles. Referring again to Joint Exhibit 45-3, the greatest distance from the north shore of any of the barrier islands to the mainland is approximately 10 nautical miles. The relation of maximum penetration to width of mouth is therefore .4167:1, which in my opinion is enough to constitute more than a mere curvature of the coast, and I so find.

It is of interest to note that the United States in its Reply Brief in *U.S. v. Louisiana*, *supra*, (1969) (contrary to the position which it now takes) reached the same conclusion in its attempt to distinguish Louisiana's claims. There it states:

> "Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation—an

> entirely different matter. Mississippi Sound, referred to by Louisiana is such a situation." (Exhibit J-66, p. 30).

The sole remaining question is whether the waters of Mississippi Sound are so enclosed as to be considered land locked. In this connection the following language from Hodgson and Alexander, "*Towards an Objective Analysis of Special Circumstances*", Occasional Paper No. 13, Law of the Sea Institute, Univ. of Rhode Island, 1972 (p. 20) appears to be particularly pertinent:

> "If a line or group of islands relate to the mouth of a bay so as to exceed in length more than 50% of the length of the bay closing line, the islands screen the mouth of the bay and form the natural limit for land-locked waters."

The straight line distance from Isle au Pitre to Dauphin Island is approximately 45 nautical miles (Exh. J 45-3, Stipulation No. 3). The water gap distance between the islands located between those two parts is 21.7641 nautical miles (Stipulation No. 1). It is therefore apparent that the islands occupy more than half the distance.

The excerpt from the Memorandum of April 18, 1961 from the Director, Coast and Geodetic Survey, Department of Commerce approved by the Court in another context and quoted above (394 U.S. at p. 66, Note 85) also appears to have some bearing upon this issue, stating at least by inference that where islands form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, the coast line should embrace those islands. The barrier islands do form such a portico, and the waters behind them are completely enclosed either by land or

adjoining inland waters except for six mouths,[8] none of which is more than 6 nautical miles in width (Exhibit 45-3, Stipulation No. 3).

In the light of these authorities I am constrained to find that the waters of Mississippi Sound are by their nature land-locked.

HISTORIC BAYS

In 1961 the United States ratified the Geneva Convention. As noted earlier, that action for the first time precisely defined inland waters. See *United States v. California*, *supra*. But that definition, while precise in some respects, recognizes certain exceptions. Article 7 Section 6 reads in part:

> "The foregoing provisions shall not apply to so-called 'historic' bays."

It is with this exception that I shall now undertake to deal.

The first reference to historic bays in the reported decisions of the Court is apparently in *United States v. California*, *supra*, where it is said:

> Historic Inland Waters.—By the terms of the Convention the 24-mile closing rule does not apply to so-called "historic" bays. Essentially these are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations. (381 U.S. at p. 172).

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8. There are references to seven mouths in the record; but if I am correct in my finding that Dauphin Island is an extension of the mainland, there are only six. See *United States v. Louisiana*, *supra*, 394 U.S. at p. 62, Note 63.

Later the Court says:

> The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive. (381 U.S. at p. 175).

Subsequently the Court considered the matter at greater length in *United States v. Louisiana*, *supra*, saying:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations.
>
> Outside the territorial sea are the high seas, which are international waters and are not subject to the dominion of any single nation.
>
> Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are neces-

narily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation. As we said in United States v. California, it is generally agreed that historic title can be claimed only when the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 381 U.S. at p. 172, 14 L.Ed.2d at 317. (394 U.S. at pp. 22-23).

To this the Court appends the following note:

A recent United Nations study recommended by the International Law Commission reached the following conclusions: "There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 YB Int'l L Comm'n 1, 13, UN Doc A/CN.4/143

(1962). See also Bouchez, supra, n. 23, at 203, 221. (394 U.S. at p. 23, Note 27).

Later in the same opinion the Court says:

Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law. As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters. There is substantial agreement however, on the outlines of a doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters. But because the concept of historic waters is still relatively imprecise and its application to particular areas raises primarily factual questions, we leave to the Special Master—as we did in United States v. California—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays. (394 U.S. at pp. 74-75).

Again the Court appends a significant note:

The United States argues that the Convention recognizes only historic bays and not other kinds of inland water bodies. We do not pass on this contention except to note that, by the terms of the Convention, historic bays need not conform to the normal geographic tests and therefore need not be true bays. How unlike a true bay a body of water can be and still qualify as a historic bay we need not decide, for all of the areas of the Mississippi River Delta which Louisiana claims to be historic inland waters are indentations sufficiently resembling bays that they would clearly qualify under Article 7(6) if historic title can be proved. (394 U.S. at p. 75, Note 100).

From this it is apparent that a body of water may to some extent be unlike a true bay and still qualify as a historic bay.

In an earlier report, I found that there were no non-juridical bays on the Louisiana coast which would so qualify and this finding was approved by the Court (420 U.S. 529). I believe however that Mississippi Sound presents quite a different factual situation and, although such will be unnecessary if the Court approves my findings that Mississippi Sound is a juridical bay, I now proceed to a consideration of those facts.

In *United States v. Alaska*, 422 U.S. 184, 45 L.Ed.2d 109, 95 S.Ct. 2240 (1975) the Court summarized the holdings of the two cases quoted above as follows:

The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." United States v. California, 381 US, at 172, 14 L Ed 2d 296, 85 S Ct 1401. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority. Louisiana Boundary Case, 394 US, at 75, 22 L Ed 2d 44, 89 S Ct 773 and 23-24, n 27, 22 L Ed 2d 44, 89 S Ct 773. (422 U.S. at p. 189).

To this language the Court adds the following note:

Some disagreement exists as to whether there must be formal acquiescence on the part of foreign

states, or whether the mere absence of opposition is sufficient. United States v. Louisiana (Louisiana Boundary Case) 394 US 11, 23-24, n. 27, 22 L Ed 2d 44, 89 S Ct 773 (1969). (422 U.S. at p. 189, Note 8).

Subsequently in that same opinion the Court says:

Even if we could agree that the boundaries selected for purposes of enforcing fish and wildlife regulations coincided with an intended assertion of territorial sovereignty over Cook Inlet as inland waters, we still would disagree with the District Court's conclusion that historic title was established in the territorial period. The court found that the third essential element of historic title, acquiescence by foreign nations, was satisfied by the failure of any foreign nation to protest. Scholarly comment is divided over whether the mere absence of opposition suffices to establish title. See Juridical Regime of Historic Waters, Including Historic Bays, 2 Yearbook of the International Law Commission, 1962 pp. 1, 16-19 (UN Doc A/CN.4/143). The court previously has noted this division but has taken no position in the debate. See Louisiana Boundary Case, 394 US, at 23-24, n. 27, 22 L.Ed.2d 44, 89 S.Ct. 773. In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless *unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. Many assertions of authority are such clear expressions of exclusive sovereignty that they cannot be mistaken by other governments.* Other assertions of authority, however, may not be so clear. One scholar notes: "Thus, the placing of lights or beacons may sometimes appear to be an act of sovereignty, while in other circumstances

it may have no such significance." Juridical Regime of Historic Waters, supra, at 14. We believe that the routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title. (422 U.S. at pp. 199-200 Emphasis supplied).

It remains to apply these principles to the historical facts of the present case.

1.) Pre-Admission History

This portion of the history of the area here involved is set forth at some length in *Foster and Elam v. Neilson*, 27 U.S. (2 Peters) 253, 300-309, 7 L.Ed. 415 (1829); in *Louisiana v. Mississippi*, 202 U.S. 1, 36-45, 50 L.Ed. 913, 925, 929 (1905); and in *United States v. Louisiana*, 363 U.S. 1, 71-75, 4 L.Ed.2d 1025, 1068-1071, 80 S.Ct. 96 (1960). It is therefore unnecessary to reiterate it here. Suffice to say that during the period from 1756 to 1819 what is now Mississippi Sound was apparently considered by whatever nation possessed the surrounding mainland and islands as part of its possession. After the acquisition of the territory by the United States by virtue of the Louisiana Purchase on April 30, 1803 Congress formally authorized the President to take possession thereof (2 Stat. 245) and subsequently (February 24, 1804) passed an Act for laying and collecting duties therein (2 Stat. 251) including "all navigable waters, rivers, creeks, bays, and inlets lying within the United States, which empty into the Gulf of Mexico, east of the River Mississippi." Spain disputed the authority of the United States in the eastern part of the area,

but on February 2, 1819 acquiesced therein by signing a Treaty of Amity with the United States.

2.) Acts of Admission

Both Mississippi's Enabling Act of March 1, 1817 (3 Stat. 348) and that of Alabama of March 2, 1818 (3 Stat. 489-490) define their boundaries as extending to the Gulf of Mexico; thence, eastwardly (or, in the case of Mississippi, westwardly), "including all islands within six miles of the shore" to its termination. The two states assert that this language establishes their southern boundaries along the southern coast of the barrier islands.

Construing the language in the Mississippi Act in *Louisiana v. Mississippi*, *supra*, the Court says:

> It seems obvious to us that it was to this chain of islands that Congress referred when it admitted Mississippi into the Union. (202 U.S. at p. 47).

This conclusion appears inescapable. There are no other islands within six miles of the southern mainland of either Mississippi or Alabama.

This still does not however resolve the question of whether the waters lying between these islands and the mainland are inland waters. The Court in *Louisiana v. Mississippi*, *supra*, thought that they were, saying:

> Mississippi's mainland borders on Mississippi sound. *This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat island.* The openings from this body of water into the Gulf are neither of them 6 miles wide. Such openings occur between Cat island and Isle a Pitre; between Cat and Ship islands; between Ship and Horn

islands; between Horn and Petit Bois islands; between Petit Bois and Dauphin islands; between Dauphin island and the mainland on the west coast of Mobile Bay. The maps show all this, and among others, reference may be made to Jeffrey's map of 1775, given in the record, and which, in reduced form, is reproduced from Jeffrey's Atlas of 1800 as the frontispiece of vol. 2, Adam's History of the United States.

(202 U.S. at p. 48 Emphasis supplied).

At first glance this would appear to settle the matter; but the United States insists 1.) that the quoted statement is mere dicta and not a holding of the Court, 2.) that the United States is not bound thereby as it was not a party to the litigation, and 3.) that in any event the Court did not hold Mississippi Sound to be inland waters.

With the first of these propositions I cannot agree. The question before the Court was whether the rule of the thalweg applied in determining the boundary between the states of Louisiana and Mississippi in Mississippi Sound. In reaching its conclusion that that rule did apply, the Court said:

> If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep-water channel. (202 U.S. at p. 49).

But counsel contend that the rule "as to the flow of the midchannel or thalweg of the River Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain, expires by its own limitation when such midchannel reaches Lake Borgne, which, in contemplation of the rule, is the open sea, and part of the waters of the Gulf of Mexico." This contention is inconsistent, as matter of fact, with

the allegation of the cross bill that "the Mississippi sound was recognized as a body of water 6 leagues wide, wholly within the state of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico," and with Mississippi's Exhibit Map A, presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi sound, is not an open sea, but a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth. (202 U.S. at pp. 51-52).

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary. (202 U.S. at p. 53).

In view of the above, a holding that "the strip of water, part of Lake Borgne and Mississippi Sound, is not open sea, but a very shallow arm of the sea" seems to me essential to the Court's holding that the rule of the thalweg applies in determining the boundary between the states.

I do, however, find more merit in the second contention of the United States. In *United States v. California*, *supra*, the Court cites three cases dealing with the *Pollard* doctrine, among them *Louisiana v. Mississippi*, *supra*. Commenting upon that decision, the Court says:

> The second case, *Louisiana v. Mississippi*, 202 US 1, 52, 50 L.ed 913, 931, 26 S. Ct. 408, 571, uses language about "the sway of the riparian states" over "maritime belts." That was a case involving the boundary between Louisiana and Mississippi. It did not involve any dispute between the federal and state governments. (332 U.S. at p. 37).

The Court then goes on to say:

> None of the foregoing cases, nor others which we have decided, are sufficient to require us to extend the Pollard inland water rule so as to declare that California owns or has paramount rights in or power over the three-mile belt under the ocean. (332 U.S. at p. 38).

As to the third proposition, I do not believe that the decision of the Court in *Louisiana* v. *Mississippi*, *supra*, requires me to find that the waters of Mississippi Sound are inland waters. I do however believe that it indicates the reasoning of the Court as of that date (1906), and is therefore pertinent to the issue of whether Mississippi Sound has been historically regarded as inland waters.

Fifty-three years later this reasoning was still apparently accepted by the United States, for in its brief in *United States* v. *Louisiana, et al.*, No. 11 Original, filed May 15, 1958, it says:

> "We need not consider whether the language, 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana* v. *Mississippi*, 202 U.S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212." (p. 254).

Conceding *arguendo* that the United States is bound neither by the holding in *Louisiana* v. *Mississippi*, *supra*, (to which it was not a party and which involved no federal question) or by the concession based upon it, still

it appears from them that for more than half a century it was accepted by the United States that under the Mississippi Act of Admission (and the Alabama Act is similar) Mississippi Sound was inland waters.

Two years later the Court in *United States* v. *Louisiana*, *supra*, construing the Louisiana Act of Admission, which contains language similar to the Mississippi and Alabama Acts, said:

> And while "all islands" within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever. (363 U.S. at pp. 67-68).

Accordingly the Court holds:

> We have already held with respect to Louisiana's claim to a three league maritime boundary that an Act of Admission which refers to all islands within a certain distance of the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands. There is nothing in Mississippi's history, just as there is nothing in Louisiana's, to cause us to depart from that conclusion in this instance. (363 U.S. at p. 81).

A similar holding as to Alabama follows (363 U.S. at p. 82).

I take these holdings to foreclose me from finding that the Acts of Admission of Mississippi and Alabama on their face establish the southern boundaries of those

states as the southern coast of the barrier islands.[9] However, they do not prevent a factual finding that Mississippi Sound is inland waters and that therefore their southern boundaries are so located. In a note to its opinion the Court says:

> The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, (US) 3 How. 212, 11 L.Ed. 565. Furthermore, since the islands enclose inland waters, a line drawn around those islands and the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coasts, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well. *We do not intend, however, in passing on these motions, to settle the location*

9. Likewise I believe that this holding forecloses any application of Sec. 4 of the Submerged Lands Act (43 U.S.C. 1311) the final sentence of which reads:

> Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

The language of the constitutions of Alabama and Mississippi tracks that of their enabling acts.

> *of the coastline of Louisiana or that of any other State.* (363 U.S. at p. 68, Note 108. Emphasis supplied).

By subsequent reference the Court applies this language to Mississippi and Alabama as well (Notes 135, 139).

I take it, therefore, that if the fact is that the barrier islands are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters and have been historically so treated and recognized, then those waters and all beneath them belong to the states. It is to make a recommendation concerning that factual determination that this matter has been referred to me as Special Master.

3.) Post-Admission History

Mississippi Sound in general is not suitable for use by ocean going vessels, as it is quite shallow, ranging in depth from 1 to 18 feet, except for artificially maintained channels between Cat Island and Ship Island leading to Gulfport and between Horn Island and Petit Bois Island leading to Pascagoula. (Exhibit 1). Furthermore, it is a cul de sac, and there would be no reason for an ocean going vessel to enter the Sound except to reach these ports. In this it is similar to Chandeleur and Breton Sounds. The language of the United States in regard to these sounds in its brief in *United States v. California*, *supra*, is equally applicable to it:

> "Moreover, even if international traffic wanted for some inexplicable reason, to go through the maneuver of making a loop into the sounds at one end and back out again at the other, it could not do so because there is not sufficient depth. Not only is it not a 'useful' route for international traffic, it is not even a feasible one." (Brief of U.S. in Answer to California's Exceptions to the Report of the Special Master, pp. 153-155).

Commenting upon this, the Court said:

> By way of analogy California directs our attention to the Breton and Chandeleur Sounds off Louisiana which the United States claims as inland waters, United States v. Louisiana, 363 US 1 66-67, note 108, 4 L ed 1025, 1066, 80 S Ct 961. Each of these analogies only serves to point up the validity of the United States' argument that the Santa Barbara Channel should not be treated as a bay. The Breton Sound is a cul de sac. The Chandeleur Sound, if considered separately from the Breton Sound which it joins, leads only to the Breton Sound. Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable. (381 U.S. at p. 171).

The situation of Mississippi Sound is identical.

The chief navigational utility of Mississippi Sound is intracoastal. Congress recognized this as early as February 8, 1817 (the year of Mississippi's enabling act) when a Committee of the House of Representatives listed among objects of national importance "a canal communication, if practicable, from the Altamaha and its waters to Mobile, and from thence to the Mississippi." (U.S. House of Representatives Document No. 427, 14th Congress, 2d Session, 1817). This ultimately reached its culmination in the Intracoastal Waterway.

The Committee on Military Affairs of the U.S. House of Representatives in its Report of February 28, 1822, recognized the importance of the intracoastal communication between New Orleans and Mobile Bay through what it described as:

> "The little interior sea, comprised between the mainland and a chain of islands bounded by Cat Island to the west and Dauphin Island to the east." (U.S. House of Reps., Rep. No. 51, 11th Congress, First Session, 1822).

On May 26, 1840 the Senate Committee on Military Affairs prepared a plan for the defense of U. S. Commerce which was printed for use by the Senate. This report suggested that a ship be stationed at Dauphin Island for the following purpose:

> "His duty should be to protect the extensive coasting trade between New Orleans, Mobile, &c. to watch and guard Mobile Bay, and its tributary streams—and in fact the line of coast from Mobile Bay to Lake Borgne." U.S. Senate Report No. 490, 26th Congress, First Session (1840).

A second report by the same Committee printed for use by the Senate on July 21, 1840 discussed ways to defend the passes between the islands into Mississippi Sound. It said:

> "The defenses indicated would cover one of the channels leading from the gulf into the broad interior water communication extending from Lake Borgne to the bay of Mobile . . ." (U.S. Senate Report No. 618, 26th Cong., First Session 1840).

Some ten years later the same Committee described the area as:

> "The broad sheet of water which lies between the coast of Mississippi and the chain of islands parallel to it, is the channel of a commerce important in peace and indispensable in war. Through this passes the inland navigation which connects New Orleans and Mobile." (U.S. Senate Committee Report No. 23, 31st Congress, First Session, 1850).

A significant event in the history of Mississippi Sound was the fortification of the western end of Ship Island. As early as 1847 the island was reserved for military purposes; in 1858 the War Department, carrying out an act of Congress of 1857, authorized the building of a fort to protect the shortcut to New Orleans, Rigolets Pass, the outlet of Lake Ponchartrain. In December 1860 work was still under way, and the Government had ordered 48 large cannon shipped from Pittsburgh. The outbreak of the war in 1861 left the Union garrison isolated on the island, and in May 1861 they destroyed the fort in order to prevent it falling into Confederate hands. For three months, from July to September 1861, five companies of Confederates held the fort, having rearmed it with eight small cannons after its "destruction." Because of the constant threat of the Federal fleet then blockading the mouth of the Mississippi, the Confederates fired the fort and evacuated the island on September 16. In December Gen. Benjamin Butler moved into the damaged fort with a garrison of about 7,000 Federal soldiers, at which time it was named Fort Massachusetts, in honor of Butler's home state, and partly rebuilt. In 1875 it was abandoned. See Caraway, "the Story of Ship Island," the Journal of Mississippi History, Vol. IV, p. 76 (1942). There could hardly be a clearer indication that the United States claimed the waters north of that island as its own, and was prepared to repel any belligerent attempt to enter them, although it was never called upon to do so; and any foreign nation which was in the least attentive must have been aware of that fact.

In more recent times, but still before the turn of the century, Mississippi Sound has been continuously recognized as an important inland water route, landlocked and separate from the Gulf. In 1880 it was described in U. S. House of Representatives Executive Document No. 58 as:

> "In many respects Mississippi Sound is one of the most important bodies of water on the Gulf coast of the United States. Secure from the heavy seas of the Gulf of Mexico . . . ."

U. S. House of Representative Executive Document No. 184 described the area in 1874 as:

> "These islands cover all the navigable passes from the Gulf of Mexico into Mississippi Sound." (U.S. House of Representatives Executive Document No. 184, 43rd Congress, First Session, 1874).

And as a final congressional example, the U.S. House of Representatives Commerce Committee reported:

> "The waters between the station [Ship Island] and the mainland being land-locked are most of the time smooth and easily traversed by row and sail boats." (U.S. House of Representatives Report Ap. 3998, 49th Congress, Second Session, 1887).

As previously noted, in 1906 the U.S. Supreme Court described Mississippi Sound as "an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama to Cat Island." *Louisiana v. Mississippi*, supra, 202 U.S. at p. 48.

In *United States v. California*, supra, the Court, commenting upon the report of the Special Master, filed before the ratification of the Geneva Convention by the United States, said:

> The Special Master found that there was no internationally accepted definition for inland waters decided, in those circumstances, that it was the position which the United States took on the question in the conduct of its foreign affairs which should be con-

trolling. He considered the relevant date on which to determine our foreign policy position to be the date of the California decree, October 27, 1947. He therefore rejected the assertion that letters from the State Department written in 1951 and 1952 declaring the then present policy of the United States were conclusive on the question before him. At the same time that decision required the Special Master to consider a great many foreign policy materials dating back to 1793 in an attempt to discern a consistent thread of United States policy on the definition of inland waters. He ultimately decided that as of 1947 the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long enclosing a sufficient water area to satisfy the Boggs formula. (381 U.S. at 163).[10]

For purposes of applying the ten mile rule, where islands lie in the mouth of a bay thus creating multiple mouths, each mouth is to be considered separately. As one commentator puts it:

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10. In an earlier note to the same opinion the Court defines the Boggs formula as follows:

> To determine whether a coastal indentation is of sufficient depth and shape to be inland water, the Boggs formula would (1) draw the closing line across the mouth of the indentation; (2) draw a belt around the shore of the indentation (similar to a small marginal belt) having a width equal to one-fourth the length of the closing line across the entrance; (3) compare the remaining area inside the closing line with the area of a semicircle having a diameter equal to one-half of the length of the closing line, and if the enclosed area is larger than that of the semicircle, the indentation is inland water. Boggs, Delimitation of the Territorial Sea, 24 Am J Int'l L 541, 548. (381 U.S. at p. 164, Note 5).

This appears however to be immaterial in the present case for Mississippi Sound clearly meets this test. Stipulation No. 9. Any bay which meets the requirements of the semicircle test under Article 7 of the Geneva Convention obviously meets those of the Boggs formula.

"A solution for the problem of setting outer limits for the United States was obtained by special adoptions pertaining to employments and islands, of the excellent principles established by S.W. Boggs, Geographer of the Department of State, in delimiting the territorial waters of the United States. These adoptions of Boggs' principles resulted in the following rules for delimiting coastal and Great Lakes water, and thereby, in part, for setting the outer water limits of the United States: (1) where the coast line is regular it shall be followed directly unless there are off-shore islands within ten nautical miles; (2) where embayments occur having headlands of less than ten and more than one nautical mile in width, a straight line connecting the headlands shall set the limits; (3) the coast line shall be followed if the indentation of the embayment is so shallow that its area is less than the area of a semi-circle drawn using the straight line as a diameter; and (4) two or more islands less than ten and more than one nautical mile from shore shall be connected by a straight line or lines, and other straight lines shall be drawn to the shore from the nearest point on each island." (Proudfoot, Measurement of Geographic Area, 1940).

The United States followed this principle in drawing the Chapman line:

> "When the Chapman line was drawn along the Louisiana coast (see Part I, 731), pursuant to the decision in *United States v. Louisiana*, 339 U.S. 699 (1950), the principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters." (Shalowitz, Shore and Sea Boundaries, Vol. 1, p. 161).

In regard to the Chapman line, the same writer says:

"The Chapman line was intended to represent graphically the ordinary low-water mark and the seaward limits of inland waters along the Louisiana coast. Its description and plotting on the charts represented an effort to apply, as accurately as possible, the principles of delimitation advocated by the United States in the proceedings before the Special Master." (Shalowitz, op.cit., Vol. 1, p. 108).

And in a footnote to the above:

"*These principles had been developed in international law or had been promulgated by the United States in its international relations.* They involved the semicircular rule (see 421) and the 10-mile rule (see 43) for bays, and the rule for straits leading to inland waters. *The latter situation did not arise in the California case.* Along the Louisiana coast all islands are so situated in relation to the mainland and to each other as to enclose all waters landward of the islands as inland waters with the result that the islands constitute large segments of the coastline. Mahler v. Norwich and New York Transportation Company, 35 N.Y. 352 (1866). Also see Brief for the United States in Support of Motion for Judgment on Amended Complaint 177, United States v. Louisiana et al., Sup. Ct. No. 11, Original, Oct. Term, 1957. The openings between the numerous islands along the Louisiana coast constitute channels leading to inland waters and the rule as to bays becomes applicable." (Shalowitz, op.cit., p. 108, Note 7 Emphasis supplied).

The Chapman line does not extend eastward beyond the Louisiana border. However in a letter to Governor Wright of Mississippi in 1951 Oscar L. Chapman, then

Secretary of the Interior, after whom the line is named, indicated that if so extended it would be as follows:

"Beginning at a point on the boundary between the State of Louisiana and the State of Mississippi, near latitude 30°09'00", longitude 8°56'40", where said boundary intersects a straight line drawn in a northwesterly direction from the ordinary low water mark at the northern most point of the most northerly island in the Chandeleur group and extending therefrom along said straight line to the ordinary low water mark at the westernmost extremity of the westernmost island of the Ship Island group of islands;

"Thence, in an easterly direction and northeasterly direction along ordinary low water mark on the Gulf side of three islands comprising the Ship Island group to the ordinary low water mark at the easternmost extremity of the easternmost of such islands, said extremity being referred to as East Point, except where such low water mark is interrupted by the opening between said islands, at such places the boundary line is a straight line across such openings;

"Thence, by a straight line in an easterly direction to the ordinary low water mark at the westernmost extremity of Horn Island;

"Thence, in an easterly direction along the low water mark on the Gulf side of Horn Island and continuing in an easterly direction along said low water mark to the easternmost extremity of an unnamed island immediately east of Horn Island near latitude 33°13'24", longitude 38°31'48";

"Thence, by straight line in a southeasterly direction across horn Island Pass to the ordinary low water mark at the northeasternmost extremity of Petit Bois Island;

"Thence, in an easterly direction along the ordinary low water mark on the Gulf side of Petit Bois Island to the intersection of said low water mark with the boundary between the State of Mississippi and the State of Alabama near latitude 30°12'12", longitude 38°23'12"."

The United States however now disclaims Mississippi Sound as historic inland waters. I must therefore consider the effect of that disclaimer.

In the *California* case, *supra*, the Court held:

> The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive. (381 U.S. at p. 175).

This seems to indicate that a higher than ordinary degree of proof is required to establish historic inland waters; but this appears to be refuted by the following language from earlier in the opinion:

> In particular it is said that the Special Master erroneously thought the concept of historic waters to be an exception to the general rule of inland waters requiring a rigorous standard of proof. We find no substantial indication of this in his report. (381 U.S. at pp. 173-174).

The Court in the *California* case attached much significance to the disclaimer by the United States. Referring to this, the Court in *United States v. Louisiana*, *supra*,

holds that any claim to historic title is barred by "long-standing, extrajudicial disclaimers of historic title." (394 U.S. at p. 29). Further construing its opinion in *United States v. California*, *supra*, the Court says:

> In *United States v. California* we noted, but found it unnecessary to pass on, the United States' contention that historic title cannot be founded upon exercises of state authority because a claim to historic inland waters can be maintained only if endorsed by the United States. We there sustained the Master's determination that, even assuming the relevance of California's assertions of sovereignty over the coastal waters, they did not establish historic title. The United States' disclaimer was credited only because the case presented such "questionable evidence of continuous and exclusive assertions of dominion." 381 U.S., at 175, 14 L. Ed.2d at 318. And we noted that we were "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." Ibid. Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.
>
> While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title. The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we

suggested in United States v. California, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. The only fair way to apply the Convention's recognition of historic bay to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent the United States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case. (394 U.S. at pp. 76-78).[11]

To this the Court appends what I consider to be a highly pertinent note:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. *It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit.* The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in United States v. California. (394 U.S. at p. 77, Note 104 Emphasis supplied).

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11. The record in the present case is clear that throughout their history the states have exercised jurisdiction over all of Mississippi Sound; however in my opinion this was not of such a nature that the United States could rely thereon in advancing a claim opposed by a foreign nation, as it was equally consistent with recognition of the sound as inland waters or territorial sea. This will be dealt with later.

The reference to the California case *supra*, in this note is to the following language:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. (381 U.S. at p. 168).

The first public disclaimer in regard to Mississippi Sound was made in April, 1971 (more than ten years after the ratification of the Geneva Convention by the United States, and more than two years after the decree in *United States v. Louisiana*, *supra*) by the publication of a set of 155 maps delineating the three mile territorial sea, the nine mile contiguous zone, and certain internal waters of the United States. These maps, which include the entire Gulf Coast, are available for sale to the general public and have been distributed to foreign governments in response to requests to the United States Department of State for documents delimiting the boundaries of the United States. They undoubtedly undertake to rescind the concession made by the United States in its brief in an earlier stage of this proceeding. However under the circumstances it is difficult to accept the disclaimer as entirely extrajudicial in its motivation. It would appear to be more in the nature of an attempt by the United States to prevent recognition of any preexisting historic title which might already have ripened because of past events but which was called into question for the first time in a domestic lawsuit.

In my judgment if Mississippi Sound was established as historic inland waters prior to the ratification of the

Geneva Convention by the United States (March 24, 1961) then it comes within the exception contained in Article 7, Section 6 thereof. Therefore, unlike the Special Master in *United States v. California*, *supra*, I must consider the letters from the State Department dated 1951 and 1952.

By letter dated October 30, 1951, the U.S. Attorney General sought the assistance of the State Department in preparing a position statement "as to the principles which govern the delimitation of the marginal sea along the coasts of this country and the demarcation of the boundary separating the marginal sea from inland waters." One of the subjects to which particular reference was made was "straits, particularly those situated between the mainland and offshore islands."

On November 13, 1951 Acting Secretary of State James E. Webb replied to this letter. In regard to bays generally, the Acting Secretary says:

> "(c) The determination of the base line in the case of a coast presenting deep indentations such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states, nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries, signed at The Hague, May 6, 1882, 73 Foreign and British State Papers, 39, 41; The North Atlantic Coast Fisheries Arbitration between the United States and Great Britain of September 7, 1910; U.S. Foreign Rel., 1910 at 166; and the Research in International Law of the Harvard Law School, 23 American Journal of International Law, 55, 266.)
>
> Subject to the special case of historical bays, the United States supported the 10 mile rule at the Conference of 1930[13] (Acts of Conference, 197-199) and the Second Sub-Committee adopted the principle on which the United States relied (Acts of Conference, 217-218). It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (Acts of Conference, 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded as a bay to which the 10 mile rule would apply (Acts of Conference, 197-199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered by the French delegation in its report, but gave no opinion regarding these systems (Acts of Conference, 218-219)."

And in response to the specific inquiry as to straits:

> "With respect to a strait which is merely a channel of communication to an inland sea, however, the

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13. The Hague Conference. See Aide-Memoire, September 27, 1949, in which the State Department responded to the Norwegian Government's inquiry regarding the extent of the United States' territorial waters in part as follows:

> "With regard to the demarcation of the line separating inland waters from the territorial sea, and to the geographic method delimiting the territorial sea, the Embassy's attention is invited to the proposals made by the United Delegation to the Hague Codification Conference of 1930 with respect to the various Bases of Discussion regarding territorial waters there considered."

United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (Acts of Conference, 201-220)."

This letter was filed as an exhibit in *United States v. California*, *supra*, then pending before the Special Master. Pending at the same time before the International Court of Justice was *United Kingdom v. Norway* (the *Anglo-Norwegian Fisheries Case*) I.J.S. 1951 in which the United Kingdom took substantially the same position, relying in part upon the United States' argument in the *Alaskan Boundary Arbitration* (1903). In oral argument on September 27, 1951 (*before* the Attorney General's inquiry and the Acting Secretary of State's reply) the United Kingdom in the *Anglo-Norwegian Fisheries case* stated referring to *United States v. California*, *supra*:

> "It has been disclosed in hearings before a Committee of Congress that the Federal Government is maintaining before the master that the principles which the United States advocated at the 1930 Conference should be applied in drawing the boundary.
>
> . . . my general point is that the Federal Government before the Supreme Court is vigorously maintaining the principles which it advocated in 1930, and that this fact is entirely inconsistent with the Norwegian Government's interpretation of the United States' practice. It is clear that the Federal Government's views before the Supreme Court are perfectly in line with the United Kingdom's views in this Court." (*Memorial of United Kingdom, Pleadings, Oral Arguments, Documents, Fisheries case (United Kingdom v. Norway)* Vol. IV, pp. 88 and 89).

It therefore appears that even at that time the position of the United States was well known in the international community, and had been since the *Alaskan Boundary Arbitration* (1903).

As previously noted, on October 17, 1951, the Secretary of the Interior had advised the Governor of Mississippi that in accordance with that position the southern boundary of that state lay along the southern coast of the barrier islands.

On December 18, 1951 the International Court of Justice decided the *Anglo-Norwegian Fisheries Case* contrary to the contentions of the United Kingdom. Accordingly on January 22, 1952, the U.S. Attorney General inquired of the State Department whether it still adhered to the position stated in its letter of November 13, 1951. In a reply dated February 12, 1952 the Secretary of State said:

> "In the view of the Department, the decision of the International Court of Justice in the Fisheries Case does not require the United States to change its previous position with respect to the delimitation of its territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that the base line follows the sinuosities of the coast and the principle that in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres

to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951."

Both the letter of November 13, 1951 and that of February 12, 1952 were made a part of the record of hearings upon the Submerged Lands Act 43 U.S.C. 1301 *et seq.* In addition, on March 3, 1953 Jack B. Tate, Deputy Legal Advisor to the Department of State, appeared before the Senate Committee on Insular Affairs and testified as follows:

> "The position of the United States is that waters of bays and estuaries less than 10 miles wide—or which are, at the first point above such openings, less than 10 miles—are inland waters of the United States, and the territorial limit is measured from a straight line drawn across these openings. A strait or channel or sound which leads to an inland body of water, is dealt with on the same basis as bays."

The Submerged Lands Act 43 U.S.C. 1301 *et seq.* was enacted May 22, 1953. On March 6, 1961 the Solicitor General of the United States wrote to the Director of the Coast and Geodetic Survey proposing certain principles for determining the coastline along the Gulf of Mexico, one of which was:

> "Waters enclosed between the mainland and offlying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters.

To this the Director of Coast and Geodetic Survey replied under date of April 18, 1961:

> "RECOMMENDATION
>
> In applying the 10-mile rule to a group of screening islands along a coast, no opening between such islands should exceed 10 miles. In the case of a series of adjoining and interconnected bays, each bay should be considered as an independent geographic feature, subject to both the 10-mile and semicircular rules.
>
> Commentary
>
> (1) Limiting the distance between screening islands along a coast to 10 geographic miles is in accord with the general policy of the United States regarding minimum encroachment upon the high seas.
>
> (2) The theory of the screening islands is that the waters between them and the mainland are sufficiently enclosed to constitute inland waters (see Part I, Item (g)). Hence, the openings are in the nature of straits leading to inland waters, which (sic) in accordance with the State Department Letter of November 13, 1951, the rules for bays apply. A 10-mile limitation on the entrance width of a bay is one of those rules.
>
> (3) The recommendation as to adjoining and interconnected bays is made on the basis that the treatment recommended would make for greater simplification in the consideration of inland waters, and would prevent areas from being included in the inland waters category that would be mere curvatures but for the adjacent bays (see Fig. 3)."

On March 24, 1961 the United States ratified the Geneva Convention, which, as noted in United States v. California, *supra*, represented a departure from its previously held position; therefore the material quoted above

represents the publicly stated position of the United States from 1903 (*Alaskan Boundary Arbitration*) to that date. Under that position, there is no doubt that Mississippi Sound constituted inland waters, as none of its mouths exceeds ten miles in width. (See Stipulation No. 6).

No foreign government has ever protested this position. See Mississippi's First Set of Interrogatories, dated September 26, 1980 and United States' Supplemental Answer to Interrogatory 27 thereof, dated June 9, 1982. I am fully aware of the following language from United *States v. Alaska, supra*:

> In this case, we feel something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the government of those countries knew or reasonably should have known of the authority being asserted. (422 U.S. at p. 200).

However I believe that in the present case it has been shown that the government of other countries knew or reasonably should have known of the authority being asserted.

I therefore find that the proof in this case shows that Mississippi Sound meets the test laid down in United *States v. California, supra*, in that the United States has traditionally asserted and maintained dominion over it with the acquiescence of foreign nations. (381 U.S. at p. 172). It also meets the tripartite test of *United States v. Alaska, supra* (422 U.S. at p. 199):

1.) The United States has exercised authority over Mississippi Sound by the position which it has taken in international affairs, before the Supreme Court of the United States, in Congressional Hearings, and by fortifying Ship Island and patrolling other inlets to the sound.

2.) This exercise was continuous from 1803 (Louisiana Purchase) to 1977.

3.) Foreign states have acquiesced in this exercise of authority as they knew or reasonably should have known of its exercise and did not protest.

I therefore find that Mississippi Sound is a historic bay within the meaning of Article 7, Section 6 of the Geneva Convention.

HISTORIC TERRITORIAL WATERS

As I have stated earlier, in my judgment the activities of the states in Mississippi Sound are not of a nature that the United States could rely thereon in advancing a claim opposed by a foreign nation (394 U.S. at p. 76) but are rather of the nature of the claims rejected by the Court in the case of *United States v. Alaska, supra* (422 U.S. at p. 198). This is because those activities are equally consistent with Mississippi Sound as either territorial sea or inland waters. As I have heretofore found, in my opinion Mississippi Sound qualifies as historic inland waters; but if I am incorrect in that, it may still in its entirety (including the enclaves) qualify as historic territorial sea, for certainly the jurisdiction exercised by the states over the enclaves has been no different from that exercised by them over the balance of Mississippi Sound. As the court says in *United States v. Louisiana, supra*:

> Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the terri-

torial sea, the area would be territorial sea." Juridical Regime of Historic Waters, Including Historic Bays, supra, n. 27, at 23. (394 U.S. at p. 24, Note 28).

I make no finding in this regard, however, as I deem it to be beyond the scope of the reference to me as Special Master, which was limited to the motions of the states and of the United States for entry of a supplemental decree fixing the coastlines of Alabama and Mississippi. This issue would not be affected by whether the enclaves are open or territorial sea.

RECOMMENDATIONS

I therefore respectfully recommend that the motions of the states of Alabama and Mississippi be granted and that a supplemental decree be entered in accordance therewith, and that the cross-motions of the United States be denied.

WALTER P. ARMSTRONG, JR.
Special Master

Apr. 9, 1984

EXHIBIT A